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Nos. 92-767 and 92-593

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF FLORIDA, ET AL.

MIGUEL DE GRANDY, ET AL., APPELLANTS

v.

BOLLEY JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR THE UNITED STATES

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In defending the State's plan for Senate districts, the Senate appellees challenge the district court's finding of liability under Section 2 of the Voting Rights Act. But appellees then argue that the district court in any event correctly ordered that the very state plan it found to violate Section 2 must remain in effect for the next decade as a "remedy."

Both of appellees' attempts to support the judgment below are unavailing.

1. The Senate appellees' principal contention on the issue of liability is that proof of proportional representation "trumps" proof of the three *Gingles* preconditions in determining whether there is a violation of Section 2. Br. 17-22. As we explained in our brief as appellee on the appeal concerning the Florida House of Representatives (92-519 U.S. Br. 14-15), we agree that proof of persistent proportional representation generally would be a defense to a Section 2 claim. But the Senate appellees have failed to demonstrate that the State's Senate plan provides the Hispanic population with proportional representation.

The State Senate has 40 members and Hispanics constitute 12.2% of the State's total population. J.A. 74. Thus, a plan designed to afford the Hispanic population proportional representation in the State Senate would have five Hispanic majority districts (40 x 12.2% = 4.88). The State's plan, however, contains only three such districts.

a. The Senate appellees are able to assert that the State's plan affords the Hispanic population proportional representation only by isolating the Dade County area from the rest of the State. But the United States and the De Grandy plaintiffs did not challenge the redistricting plan for the Dade County Senate; they challenged the redistricting plan for the Florida Senate. The State's proportional representation defense never comes to grips with this fact.[1]

[1] The Senate appellees assert (Br. 23) that the United States did not allege vote dilution on a statewide basis, and that there accordingly was no need for them to raise a proportional representation defense on a statewide basis. But as we explain in our brief on the appeal concerning the House of Representatives (92-519 U.S. Br. 32-34), the United States alleged and proved vote dilution on a statewide basis with respect to both the House and the Senate.

b. Nor do appellees adequately address the case law supporting a statewide approach, including *Davis* v. *Bandemer*, 478 U.S. 109, 127 (1986) (opinion of White, J.); *id.* at 169 (Powell, J., concurring in part and dissenting in part), and *McGhee* v. *Granville County*, 860 F.2d 110, 118-119 & n.9 (4th Cir. 1988). As discussed in our brief on the House appeal (92-519 U.S. Br. 20-21), those cases establish that when plaintiffs challenge the redistricting of a body with statewide jurisdiction, the proper frame of reference for a proportional representation defense is statewide.

The Senate appellees argue (Br. 27) that *McGhee* simply stands for the proposition that not all minority group members will wind up in the remedial districts in which the minority group constitutes the majority. But we did not cite *McGhee* for that "obvious point" (Appellees' Br. 27). Instead, we cited *McGhee* for the court's express recognition that vote dilution affects all minority voters in the jurisdiction, specifically including those who live outside the geographically compact area, defined by the first *Gingles* precondition, in which the minority group could constitute a majority. See 860 F.2d at 118 n.9 ("[H]ere—as in dilution cases generally—the claim of dilution by submergence is made by a class consisting of *all* the [minority] voters of the jurisdiction."); see also 92-519 U.S. Br. 20. Indeed, it was the treatment of those "geographically dispersed minority voters" (Appellees' Br. 27)—not the voters within the geograph-

ically compact majority-minority districts—that was at issue in *McGhee*. Appellees offer no explanation for why *McGhee*'s reasoning is incorrect, or why it is inapplicable to this case.[2]

Nor do appellees succeed in distinguishing *Davis* v. *Bandemer*. Appellees state (Br. 28 n.28) that "the difference [between this case and *Davis*] is that in Ohio, concentrations of Democratic voters could be found statewide, while Florida's concentration of Hispanic voters is in a single county."[3] Neither the plurality nor any other opinion in this Court discussed how evenly concentrations of Democratic voters were distributed throughout the State. Indeed, in language quoted by appellees, the plurality specifically explained that the claim was brought on behalf of *all* Democratic voters in the State: the vote dilution affected "Democratic voters over the State as a whole, not Democratic voters in particular districts." 478 U.S. at 127 (quoted at Appellees' Br. 28 n.28). The same point was made by two Justices who did not join the plurality. See 478 U.S. at 169 (Powell,

[2] It is of course true that in *McGhee* the members of the minority group lived in a single county, while members of the minority group in this case live throughout the State. That is unsurprising, in light of the fact that *McGhee* involved dilution of the minority vote for members of a county governing body, while this case involves dilution of the minority vote for members of the state legislature. A county occupies a smaller area than a State, but the coverage of Section 2 is surely not limited to relatively small jurisdictions. The members of the minority group in *McGhee* may well have been just as geographically dispersed through the county as are Hispanics in the State of Florida.

[3] *Davis* in fact involved the apportionment of the Indiana legislature, not that of Ohio. 478 U.S. at 113.

J., joined by Stevens, J., concurring in part and dissenting in part). Thus, six Justices concluded in *Davis* that vote dilution affects the disadvantaged group statewide, regardless of whether the concentrations of members of the particular group alleging a violation (in that case, Democrats) are evenly dispersed throughout the State or located in particular areas of the State. Again, appellees do not explain why the same analysis is inapplicable in this case.

c. In our brief as appellee on the House appeal (92-519 U.S. Br. 24-26), we showed that in redistricting cases involving statewide legislative bodies, only a statewide test of proportional representation is workable. Although the Senate appellees label that argument "specious" (Br. 28), their only basis for that characterization is their claim that "[t]he boundaries under [the Senate appellees'] theory are clearly defined by the *Gingles* requirement of geographic compactness." Br. 28-29. The Senate appellees, however, have never "clearly defined" the area in which proportional representation is to be measured under their view, and even now they do not define it as the area in which the plaintiffs demonstrated that the minority group was geographically compact.

The Senate appellees do offer (Br. 16) three alternative areas in which proportional representation could be measured—Dade County, the seven districts lying wholly or partially within Dade County, or the five districts lying wholly within Dade County. They suggest no reason for selecting one of these over the other, or for selecting any of those three areas over innumerable other subparts of the State.

Nor are any of appellees' three alternative areas "clearly defined by the *Gingles* requirement of geographical compactness." The *Gingles* compactness precondition requires plaintiffs to show that the minority group is sufficiently large and geographically compact to constitute a majority in one or more single-member districts. *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986). In this case, the district court found that the plaintiffs had satisfied that requirement by introducing a plan in which Hispanics constitute a majority in four compact single-member districts. J.S. App. 40a-41a. The Senate appellees have not challenged that finding. Thus, the only area even arguably defined by the *Gingles* compactness requirement is the area within the four Hispanic majority districts drawn by the plaintiffs. Yet the Senate appellees do not even now rest their proportional representation defense on the area within those four districts. Nor do they explain how proportional representation for Hispanics in those four districts would be calculated.

In addition, even the area within the districts drawn by the plaintiffs is not necessarily "clearly defined" by the compactness requirement. In this case, the plaintiffs could no doubt have satisfied the compactness requirement by drawing districts that differed in at least some respects from those in the plan (Plan 180) that they proffered. And even if that were not true in this case, there will be many vote dilution cases in which plaintiffs can offer alternative ways to draw majority-minority districts. In *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 n.5 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989), for example, the court found that plaintiffs had shown that the

Gingles compactness requirement could be satisfied in three different ways. If the Senate appellees' approach were adopted, there would be no principled way to decide which of the alternative plans should be used to determine whether there is proportional representation.

The fact that the compactness requirement does not provide a workable solution here is hardly surprising. This Court did not adopt the compactness requirement in *Gingles* to deal with the issue of proportional representation. That requirement serves a very different purpose—to ascertain whether the minority group is sufficiently large and geographically compact to constitute a majority in one or more single-member districts and thereby to determine whether the dilution of the minority vote is attributable to the geographic dispersal of the minority or the failure to create majority-minority districts. 478 U.S. at 50 n.17. It does not answer the question whether a minority group, despite the presence of racial bloc voting, has achieved or can achieve persistent proportional representation.

d. Finally, the Senate appellees argue (Br. 29-32) that census figures not in the record and not before the district court establish that Hispanics would be represented statewide under the State's plan in proportion to their percentage of the citizen voting age population. For the reasons given in our brief on the House appeal (92-519 U.S. Br. 26-32), any claim of proportional representation based on those figures rests on dubious legal and factual premises that have not been litigated before the district court or any other lower court. Accordingly, it is not ripe for consideration by this Court.

2. In our opening brief (at 12-16), we argued that the district court erred in imposing the State's plan as a remedy without first conducting remedial proceedings to determine whether it was possible to fashion a plan containing four Hispanic majority districts and three African-American majority districts. We pointed out (Br. 14) that the district court mistakenly relied on the highly equivocal statements of one witness and the unsworn statements of counsel for one party in finding that a 4-3 plan was not feasible. More important, we noted (Br. 14-15) that the court never informed the parties that it would make its decision concerning the possibility of a 4-3 remedy based on evidence introduced at the liability phase of the trial.

a. The Senate appellees make no effort to defend the court's reliance on the equivocal statements of counsel and a single witness. Nor do they disagree with our submission that the feasibility of a 4-3 plan was not at issue during the trial. Instead, the Senate appellees argue (Br. 34-35) that the district court's finding that the State's plan is the "fairest" to all ethnic groups, see J.S. App. 66a, is equivalent to a "totality of circumstances" finding that there was no Section 2 violation at all and is therefore entitled to a highly deferential standard of review. Appellees are wrong.

The district court made quite clear that its "fairness" conclusion was not a "totality of circumstances" finding that the Florida plan did not violate Section 2. See J.S. App. 72a ("the Florida Senate plan violates Section 2 of the voting rights act"). Rather, the court was of the view that, because an "ideal" (J.S. App. 60a) 4-3 remedy was not possible, the State's plan

was the fairest remedy for the violations it had found. Appellees do not offer a persuasive reason for failing to take the district court at its word.[4] Indeed, the Senate appellees' attempt (Br. 34) to obtain special deference for the supposed "totality of circumstances" finding of no Section 2 violation is particularly odd in a case in which the district court made an express "totality of circumstances" finding that there *was* a Section 2 violation. See. J.S. App. 30a.

b. In defending the district court's adoption of the State's plan, the Senate appellees also rely on the district court's finding that the plaintiffs' Plan 180 would have "impair[ed] the interests of African-American voters" by creating a less effective African-American "influence" district than that in the State's plan. Br. 33; see J.S. App. 63a. As explained in our opening brief (Br. 16-18), the district court found that both Plan 180 and the State's plan contained two African-American majority districts and one "influence" district. Although the district court found that the influence district in the State's plan was more effective than the one in Plan 180, that was only because the court applied different legal standards to gauge their effectiveness. The Senate appellees argue (Br. 34-35) that there are factual differences

[4] The Senate appellees rely (Br. 13 & n.17) on a statement in the court's July 2 judgment that there was no violation of Section 2. See J.S. App. 5a. In its subsequent opinion, however, the court clarified that it meant that there was a violation, but that the State's plan was the fairest remedy. See J.S. App. 72a. As we noted at the jurisdictional stage, the court clearly had the authority to write an opinion clarifying the basis for its judgment. See J.S. 9 n.7; U.S. Br. in Opp. to Mot. to Dismiss or Affirm 1-3.

between the two districts, but they offer no defense of the court's inconsistent legal analysis.

In any event, we are not asking this Court to hold that Plan 180 should be imposed as a remedy. That plan was introduced for the sole purpose of proving the first *Gingles* precondition. Once the district court found that the precondition was satisfied and that violations of Section 2 had occurred, any perceived deficiencies in Plan 180 became irrelevant. At that point, the district court should have held a remedial hearing to determine the appropriate remedy, at least for elections after 1992. See U.S. Br. 19.

The Senate appellees seek (Br. 33) to justify what the district court did on the ground that "the competing interests of *two protected minority groups*" were at stake. But it is precisely because of the district court's finding of a Section 2 violation as to each of two minority groups that the district court should have given particularly careful consideration to whether a plan could be devised to remedy *both* violations, rather than approving a plan that remedied *neither*—and indeed was the very plan that the court found to violate the Act.

c. Finally, appellees suggest (Br. 36-37) that a 4-3 plan is simply not feasible. The De Grandy plaintiffs, however, have already offered a motion for reconsideration containing such a plan. And we are confident that there are other ways to accomplish the same objective. More important, this issue cannot be resolved on the basis of assertions of the parties in this Court. It must be decided on the basis of evidence received at a remedial hearing. The purpose of our appeal is to secure such a hearing.

For the foregoing reasons and those stated in our opening brief, the district court's remedial order should be vacated and the case should be remanded with directions to determine the appropriate remedy for future elections.

Respectfully submitted.

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